

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



NO.

75-1273

UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

UNITED STATES OF AMERICA,

PLAINTIFF-APPELLEE

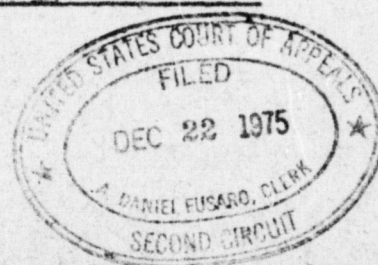
v.

MICHAEL MARCIANO,

DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS BRIEF



COUNSEL FOR DEFENDANT-APPELLANT  
LAW OFFICES OF KENNETH R. CLAUDAT  
BY: WILLIAM M. SCHREIBER  
574 NEWARK AVENUE  
JERSEY CITY, NEW JERSEY 07306  
(201) 420-0858

## TABLE OF CONTENTS

### Page

Table of Contents .....	i
Table of Citations .....	ii
Table of Statutes .....	iii
Procedural History .....	vii
Issues .....	ix
Statement of the Case .....	x
Argument.....	1
I Documents pertaining to the value of the sea- food hijacked were improperly admitted because (a) the circumstances of preparation indicate a lack of trustworthiness and (b) they were admitted without a proper foundation .....	1
II Testimony relating to the value of canned hams hijacked from the Arrow Transportation Co. was improperly admitted because the witness who gave the testimony was not qualified as an expert wit- ness .....	4
III Photo identification of defendant was error with- out a prior Simmons type hearing .....	5
IV The Judge in his charge referred to the defendant Marciano as a "fence" and by doing so invaded the right of the jury to determine the facts and pre- judiced the jury against the defendant .....	7
V Reading of portions of a plea of the defendant Marciano involving a 1970 charge of receiving stolen property as proof of intent, knowledge and design to commit the present offense charged was improper .....	8
Conclusion .....	9



# TABLE OF CITATIONS

## I. Cases

Page

<u>Gilbert v. California</u> 388 U.S. 263, 87 S. Ct. 1951 (1967) .....	6
<u>Gravatt v. U. S.</u> 260 F. 2d 498 (10th Cir. 1958) .....	8
<u>Hoffman v. Palmer</u> 129 F. 2d 976, (2nd Cir. 1942), affirmed 318 U. S. 109 (1942) .....	1
<u>In re. Holzapfel's Sons Inc.</u> 249 F.2d 861 (7th Cir. 1957).....	2
<u>Kelly v. New York, N H &amp; H R Co.</u> 138 F. Supp. 82 (D. Mass. 1956).....	4
<u>Quercia v. U. S.</u> 289 U. S. 466, 53 S. Ct. 698 (1933) .....	7
<u>Simmons v. U. S.</u> 390 U. S. 377, 88 S. Ct. 967 (1968) .....	ix,5
<u>U. S. v. Smith</u> 399 F.2d 896, 6th Cir. 1968) .....	7
<u>U. S. for Use of Automatic Sprinkler Corp. of America v. Merritt-Chapman &amp; Scott Corp.</u> 191 F. Supp. 638 (M.D.Pa. 1961).....	3
<u>U. S. v. Wade</u> 388 U. S. 218, 87 S. Ct. 1926 (1967) .....	5

## TABLE OF STATUTES

### Title 18, United States Code, Section 659

#### Interstate or foreign shipments by carrier - State prosecutions.-

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property; or

Whoever embezzles, steals, or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus,



vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen -

Shall in each case be fined not more than \$5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels.

The carrying or transporting of any such money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which the same shall have been brought by such offender.

To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima

facie evidence of the place from which and to which such shipment was made. The removal of property from a pipeline system which extends interstate shall be prima facie evidence of the interstate character of the shipment of the property.

A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts. Nothing contained in this section shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this section operate to the exclusion of State laws on the same subject matter, nor shall any provision of this section be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this section or any provision thereof.

Title 18, United States Code, Section 2

Principals. - (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Title 28, United States Code, Federal  
Rules of Evidence 803 (6)

Records of regularly conducted Activity. - A memorandum



report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Title 28, United States Code, Federal  
Rules of Evidence 404 (b)

Other crimes, wrongs, or acts. - Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

### PROCEDURAL HISTORY

This case is an appeal from a criminal conviction entered in the United States District Court for the Southern District of New York on May 30, 1975 before the Honorable Dudley B. Bonsal and a jury. The defendant, Michael Marciano, was found guilty of counts 1, 3 and 5 of Indictment S.75 Cr. 402 which charged: Count 1, Conspiracy to aid and abet a hijacking in violation of Title 18 U.S.C. Sections 659 and 2; Count 3, Receiving stolen property and Court 5, Receiving stolen property. Prejudicial error was committed during the course of the trial requiring a reversal of the convictions entered against the defendant as to Counts 1,3 and 5 of Indictment S.75 Cr. 402.

The facts below demonstrate that certain documents relative to the value of seafood hijacked were erroneously admitted as business records since the circumstances surrounding the preparation of these documents indicate a lack of trustworthiness. Additionally, no proper foundation as to these business records was ever developed as required by Federal Rule of Evidence 803 (6). Likewise, the value of certain canned hams was introduced into evidence upon the testimony of a witness who was not qualified to testify as to the value of the goods.

Evidence relating to a photo identification of the defendant Marciano was admitted without the benefit of a voir



dire to determine if the pretrial identification procedure was properly conducted.

The Government's reading from portions of the plea of Mr. Marciano to the 1970 receiving stolen goods charge made in the Superior Court of New Jersey for purposes consistent with Federal Rule of Evidence 404 (b) was improper since only a certified copy of conviction may be used to show a prior conviction.

Finally, Judge Bonsal during his charge to the jury in referring to Mr. Marciano as a "fence" invaded the jury's province as trier of fact and prejudiced the defendant by such a statement.